IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

ROAD IMPROVEMENT DISTRICT NO. 1 OF FRANKLIN COUNTY, ARKANSAS, M. B. CONATSER, F. W. GREER, ET AL.....Appellants

vs. ~~No. 250~~ 38

MISSOURI PACIFIC RAILROAD COMPANY .....Appellee

Appeal from United States Circuit Court of Appeals for the Eighth Circuit.

STATEMENT AND BRIEF FOR APPELLEE

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AUTHORITIES

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STATEMENT AND BRIEF FOR APPELLEE

STATEMENT

The Circuit Court of Appeals in its opinion says:

"The Road Improvement District was organized under an act of the Arkansas Legislature, designating commissioners to have charge of the proposed improvements, which was to be assessed and paid for upon the basis of benefits to the real property of the district, and having

for its general purpose the construction of a highway across the county of Franklin, shown to be part of a general plan of connecting the cities of Fort Smith and Little Rock in that state. While the highway does not exactly parallel the railroad, as the railroad follows more directly the course of the Arkansas River, both highway and railroad follow the same general direction through the county, for a distance of some 25 or 30 miles. The evidence shows that the commissioners with the aid of assessors, made the assessment within the district for the highway improvement which was originally to cost the sum of $230,000.00. The amount assessed against the railroad property was first a little in excess of $54,000.00 and when it was found that sufficient would not be raised by the first assessment to complete the highway, an additional assessment of approximately 40% was levied, making the railroad's entire share of the assessment approximately $75,000.00. Appropriate steps were taken by the railroad company in the courts to combat the assessment within the time fixed by the act of the legislature. The state legislature subsequently passed an act attempting to confirm the assessments as originally made against the property of the railroad company and others, and by a still later act, attempted to confirm the additional assessment. * * *

"The evidence taken upon the hearing tends to show that while the assessment against the real property in the created district was upon an acreage value within certain designated distances from the highway, that the basis used for the assessment against the railroad was a mileage basis, or that used for general taxation purposes and which under the state system of taxation includes a certain portion of personal property. While those who had made the assessment, by their testimony attempted to show that they had considered the benefits which would accrue to the railroad on account of the highway improvement, no particular basis for arriving at the benefit was shown to have been adopted other than a mere arbitrary opinion of the assesosrs that it would be beneficial, and retaining solely as the basis of the assessment, the mileage of the railroad within the improved district. Numerous witnesses were introduced who testified to the fact that instead of the highway being a benefit to the railroad it would be a detriment owing to the increased motor traffic which would create an intensive competition over short hauls. * * *

"Inasmuch as the assessment contemplated by the act was to be upon the basis of benefits realized from the proposed improvement, the strong showing by the evidence that the highway improvement would be a detriment rather

than a benefit to the railroad company and that any benefit accruing to the railroad would be so speculative as to be unascertainable, we are of the opinion that the trial court must be sustained." (R. 175-176).

The District Court's findings of law and fact are as follows:

"1. The assessment against the property of defendant includes personal as well as real property. The inclusion of personal property is unlawful.

"2. The assessment against the real estate of the defendant is on a mileage basis. The valuation for general taxation is taken. The assessment against other real estate is upon an area basis at a certain amount per acre dependent upon distnce from the highway contemplated. This method of assessment is palpably arbitrary and discriminatory and results in a denial to the defendant of equal protection of the laws.

"3. There will be no direct benefit to the property of the Railroad Company by the construction of the highway. On the contrary there will be a loss to it in freight and passenger traffic by reason of the construction of the highway.

"4. An indirect benefit to the defendant

Railroad Company by the construction of the highway is remote, doubtful and speculative.

"5. The prayer of the bill should be granted." (R. 38-39).

THE DISTRICT COURT'S FINDING OF FACTS SUSTAINED BY THE EVIDENCE.

The blue print introduced in evidence (R. 21) shows that the highway proposed to be improved parallels the line of railroad of the appellee for the entire distance through Franklin County; that said highway when completed would constitute a link in the highway between the Cities of Little Rock and Fort Smith, Arkansas. (R. 43-44).

It was shown by the evidence that the District embraces approximately 67,000 acres of land; that the total assessment of benefits against all the land in the District was $575,421.35, and of this amount $75,686.00 is assessed against 32.59 miles of Missouri Pacific Railroad Company's right-of-way, comprising 565 acres of land (R. 49); that the assessment of benefits averages $2,322.36 per mile of main line of right-of-way, or an average rate of about $134.00 per acre of right-of-way (R. 50); that the acreage of the right-of-way of the Railroad Company is about eight-tenths of one percent of the total area

in the District and is assessed about 13.2 percent of the total benefits fixed for the entire District; that if the same area assessment levied for all property in the District adjacent to railroad property, including towns, had been applied to the railroad right-of-way the benefits would have totalled for the railroad property embraced in the District about $6,917.00, or 1.2 percent of the total benefits in the District, or on an average of $212.26 per mile of right-of-way for the 32.59 miles. This would be an average of $12.24 per acre of right-of-way. (R. 50).

The first finding that the assessment against the property of defendant includes personal, as well as real property, is shown by the certificate of the Secrteary of the Arkansas Tax Commission, and is undisputed (R. 157), and it appears that personal property to the amount of $52,465.00 was included. (R. 156).

The second finding:

> "The assessment against the real estate of the defendant is on a mileage basis. The valuation for general taxation is taken. The assessment against other real estate is upon an area basis at a certain amount per acre dependent upon distance from the highway contemplated. This method of assessment is palpably

arbitrary and discriminatory and results in a denial to the defendant of equal protection of the laws."

WILL HILL, one of the assessors, testified that the assessment was made upon the basis of the assessment for general taxation purposes, and that they accepted the valuation as certified out to the County Assessor by the State Tax Commission (R. 113), and that they adopted a zone system in making the assessment:

> "If the property was in a mile of the highway, we considered that as the first zone; if it was two miles, we considered that the second zone; if it was three miles we considered that the third zone, and we had a few instances where we had a fourth zone. That would reach back into the hills."

That in the first zone the assessment was made on the basis of 25 percent of the valuation, and in the second 20 percent, in the third 15 percent, and the fourth, ten percent. (R. 111).

JOHN MOSELY, assessor, testified that they were governed by the assessed value of the railroad company's property, as shown on the tax collector's book, and that was the basis upon which the assess-

ment against the railroad property was made. (R. 116).

ED B. MELTON, the other assessor, testified with reference to the increase in the assessment that it was made irrespective of any benefits that would accrue to the property; that they increased the original assessment forty percent.

"Q. Did you do that irrespective of any benefits that accrued to the property?

A. The Commissioners said they had to have about forty percent increase in taxes to finish the road. * * *

Q. * * * What elements were considered by you in the assessment of benefits? * * *

A. We just put on forty percent, that is all.

Q. Well, you didn't consider any elements then at all as far as any benefits were concerned?

A. Just the Commissioners said they had to raise so much money and it would take forty percent, enough to finish the road, and with four or five exceptions we just added forty percent. Some poor land back in the county we didn't add forty percent. * * *

Q. But as far as the railroad was concerned you didn't consider whether the railroad

would be benefited or damaged, or take into consideration any elements at all with reference to that, you merely made an increase of forty percent?

A. Yes sir." (R. 123-124).

ROAD A DETRIMENT AND NOT A BENEFIT TO THE RAILROAD

In support of the Court's finding that the building of the parallel highway is a detriment instead of a benefit to the railroad, the attention of the Court is called to the following testimony:

R. E. WARDEN testified:

"The hard surfaced road develops competition through the use of the motor-driven vehicles, such as motor trucks for hauling freight, automobiles transporting passengers. It takes business away from the railroads. * * * There is a hard surfaced road between the cities of Little Rock and Pine Bluff, for instance. There are scheduled automobile cars between the two cities carrying passengers. They don't only transport passengers over this line of highway but motor trucks haul freight. (R. 52-53).

W. W. TRIMBLE, Division Freight Agent, testified:

"At Little Rock I made personal investiga-

tion to develop the cause of loss of business between Little Rock and Benton. There is a paved road out 13 or 14 miles and the balance of the distance to Benton is a good gravel road. The last 18 months or two years there has been trucks operating between these points and they handle 90 percent of the merchandise business moving between the two towns. Before the completion of this good road and before these trucks began operating, the Missouri Pacific ran a daily pack car from Little Rock to Benton. Our records previous to the time of the truck operation shows that that car averaged from twelve to fifteen thousand pounds of merchandise each day, and we have been deprived of that traffic. * * * It would average forty to forty-five dollars a day. * * * The local freight still operates from Little Rock to Gurdon." (R. 73).

M. J. CROTTY, Superintendent, testified that he was familiar with the road that was being constructed by Road Improvement District No. 1 through Franklin County; that he had been over a portion of the road about a week before the trial; had been connected with the Missouri Pacific Railroad Company for 23 years and been in the railroad business about 40 years; the effect of building a parallel hard surface highway upon the traffic of

the railroad materially reduces the traffic hauled by the railroad. (R. 80-81).

> "The railroad can not compete on short hauls with the motor truck, because the motor truck has absolutely no maintenance or roadway, and another thing they make street door deliveries. The merchant has the advantage of the drayage in connection with the hauling on trucks. * * * In places they have hard surface roads, it has developed the country but has not increased the earnings of the railroad. In other words, it has reduced them. * * * The motor truck is the strongest competitor that the railroad has in transportation." (R. 83).

C. E. CARSTARPHEN, Division Agent, testified:

> "Have been connected with the Missouri Pacific Railroad Company for 35 years. Look after the general business of the company at all points in certain territory, get the traffic, and get all I can out of it. * * * I have observed the effect of the building of a hard surfaced highway paralleling the railroad, and it is detracting from the traffic. * * * It has deprived us of a great deal of local business where we have had certain package cars operating from a point to a point within a short distance, say 30 or 40 miles, we have practically lost all that

business. * * * We have to run the trains whether we get the traffic or not." (R. 84-85).

C. L. STONE, Passenger Traffic Manager of the Missouri Pacific Railroad, testified:

"I have observed the effect of the construction of improved highways paralleling a line of railroad. (R. 95). Information tabulated from reports of our agents in the early part of 1922 and at a time when traffic was at its lowest covering regularly operated auto busses and jitneys exclusive of privately owned cars indicates that the approximate loss per annum in the State of Arkansas totals $150,000.00. As these roads are completed from time to time naturally the loss in revenue will become greater. (R. 96). * * * It is not always true that anything that develops a territory which a railroad serves must necessarily be of benefit to the railroad. In the case of good roads paralleling a common carrier it is a detriment to the carreir. On the other hand, if good roads are built out into the country for the purpose of bringing people and products to the railroad station, then I would say it would be a benefit." (R. 96.)

D. R. LINCOLN, Assistant Freight Traffic Manager, Missouri Pacific Railroad Company, testified:

"I have observed the effect of building im-

proved highways paralleling the lines of the Missouri Pacific Railroad in Arkansas. The effect of the construction of such improved highways has been to seriously curtail the tonnage of the railroad company. With the completion of such improved highways, and after they have been opened for public use, there has developed keen competition with automobile trucks operated by individuals and companies for the transportation of merchandise." (R. 97).

The entire evidence in the case has been incorporated in the record, under stipulation of counsel, and approved by the Court (R. 167), and we submit that the evidence fully supports the third paragraph in the findings of fact made by the District Court to the effect:

"There will be no direct benefit to the property of the Railroad Company by the construction of the highway. On the contrary there will be a loss to it in freight and passenger traffic by reason of the construction of the highway." (R .39).

BRIEF OF THE ARGUMENT

PARALLEL HIGHWAY A DETRIMENT RATHER THAN A BENEFIT TO A RAILROAD.

We have quoted from the testimony of the witnesses who were in a position to know, including traffic men from both the passenger and freight department of the railroad. The evidence conclusively establishes that the highway parallels the railroad, and it is a fact that can not be controverted, and from the testimony of the witnesses on behalf of the railroad it is further established beyond question that a parallel highway is a detriment instead of a benefit to a railroad. This fact is a matter of such general knowledge that the Courts will take judicial notice of it.

The late President Harding, in his last message to Congress, as reported in Congressional Record of December 8, 1922, says:

> "We ought to turn the motor truck into a railway feeder and distributor instead of a destroying competitor. * * *
>
> Yet we have paralleled the railways, a most natural line of construction, and thereby taken away from the agency of expected service much of its profitable traffic, for which the taxpayers

have been providing the highways, whose cost of maintenance is not yet realized.

The Federal Government has a right to inquire into the wisdom of this policy, because the National Treasury is contributing largely to this highway construction. Costly highways ought to be made to serve as feeders rather than competitors of the railroads, and the motor truck should become a co-ordinate factor in our great distributing system."

It is a matter of common knowledge that motor trucks and automobiles carry freight and passengers. The only business of a railroad is transportation. Its only income is derived from the traffic it transports. The value of its property depends upon the amount of the net revenue arising from such traffic. Anything which deprives it of traffic is a detriment and not a benefit.

The testimony of the passenger traffic manager of the railroad shows that the proximate loss during the year 1922 of passenger traffic on account of automobiles being operated in competition with the railroad in Arkansas would deprive the railroad of passenger traffic, the revenue from which would amount to $150,000.00 a year, and the witness made the further significant statement:

"As these roads are completed from time to

time, naturally the loss in revenue will become greater."

Much stress is laid by counsel for appellant upon the case of Branson v. Bush, 251 U. S. 182. However, in that case, the highway was not a parallel one, but one which extended from the railroad into the interior of the country, and there was no evidence introduced as to a loss of traffic that would occur on account of the construction of that road. In fact the Court in its opinion in that case stated:

> "It is a significant fact that no traffic man was called,"

and in that case there was no assessment made by a Board of Assessors under the provisions of the Act which required them to assess only, as provided in Section 9 of the Act involved in the case at bar, the "value of all benefits to be received by each land owner by reason of the proposed improvements, as affecting the lands, railroads and tramroads, telegraph lines, telephone lines within the District." (R. 4).

In the Branson v. Bush case there was a legislative determination in advance of the benefits that would accrue to the property in the District. Section 5 of the Act involved in that case, and which is quoted in the opinion of the Court, provides:

"It is ascertained and hereby declared that all real property within said District, including railroads and tramroads, will be benefited by the building of the said highway more than the cost thereof as apportioned in the county assessment of each piece of property within the District for this and the succeeding years, and the cost thereof is made a charge upon such real property superior to all other mortgages and liens except the liens for the ordinary taxes, and for improvement districts heretofore organized;"

In the later case of K. C. S. Ry. Co. v. Board of Improvement District No. 6, of Little River County, Arkansas, 256 U. S. 658, there was involved an assessment of benefits against the property of the railroad company made by a Board of Assessors as provided in the Act involved in this case, and the Court said:

"The statute under consideration prescribes no definite standard for determining benefits from proposed improvements. The assessors made estimates as to farm lands and town lots according to area and position, and wholly without regard to their value, improvements thereon, or their present or prospective use. On the other hand, disregarding both area and position, they undertook to estimate benefits to the prop-

erty of plaintiffs in error without disclosing any basis therefor, but apparently according to some vague speculation as to present worth and possible future increased receipts from freight and passengers which would enhance its value, considered as a component part of the system.

Obviously, the railroad companies have not been treated like individual owners, and we think the discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law. Benefits from local improvements must be estimated upon contiguous property according to some standard which will probably produce approximately correct general results. To say that 9.7 miles of railroad in a purely farming section, treated as an aliquot part of the whole system, will receive benefits amounting to $67,900 from the construction of 11.2 miles of gravel road seems wholly improbable, if not impossible. Classification, of course, is permissible, but we can find no adequate reason for what has been attempted in the present case. (Citing cases.) It is doubtful whether any very substantial appreciation in value of the railroad property within the district will result from the improvements, and very clearly it can not be taxed upon some fanciful view of future earnings and distributed values, while all other property is assessed solely accordingly to area and position. Railroad prop-

erty may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all."

The assessors in the case at bar testified that they divided the territory embraced in the District into four zones (R. 11), and irrespective of any benefits that would accrue to any particular property, and particularly the railroad property, they adopted the assessment made for general taxation purposes, as it appeared upon the tax books (R. 110), as a basis for making the assessment of benefits. (R. 116). They did not consider the fact that the building of the road would develop competition for the railroad, or what effect the building of the highway would have upon the traffic of the railroad. (R. 118). And the increase in the original assessment of forty percent was likewise made upon an arbitrary basis, as one of the assessors testified that they were advised by the Commissioners that it would require forty percent more to complete the road (R. 123), and that they did not take into consideration any benefits that would accrue to the property in the District when the increase was made.

(R. 123-124). One of them testified in answer to the question:

"What was your opinion based upon? What facts were taken into consideration in forming or reaching your conclusion that the property of the railroad would be benefited?

A. The improvement of the country and the hauling they would get in doing the improvement and buildings, such as that.

Q. You took those facts into consideration that the haulage would be greater if the road was built?

A. Yes sir.

Q. Did you take into consideration the fact that it would develop competition by motor trucks?

A. I don't remember whether we did or not." (R. 116).

Another assessor testified in answer to the last question:

"I don't think we did." (R. 118).

The method pursued by the Board of Assessors in this case has been so often condemned by the Courts generally that the citation of authorities

on the subject would be useless, but we submit that by an overwhelming amount of evidence it is not only demonstrated that the railroad would not be benefited by the construction of this parallel highway, but that it would be a detriment, and no benefits would accrue to it that could be made the basis for an assessment of benefits against its property.

THE ACT OF THE LEGISLATURE CREATING THE DISTRICT ONLY AUTHORIZES AN ASSESSMENT ACCORDING TO "THE VALUE OF ALL BENEFITS TO BE RECEIVED.."

Under the above provision, if no benefits accrue to any particular property, it cannot be assessed.

The Supreme Court of Arkansas, in numerous opinions, has so declared the law:

> "Special benefits to the property assessed, that is, benefits received by it in addition to those received by the community at large, says Judge Dillon, is the true and only solid foundation upon which local assessments can rest. They are based upon the assumption that the persons upon whose property they are imposed are SPECIALLY and PECULIARLY benefited in the enhancement of the value of their property by the expenditure of the money collected on

the assessmnet, and while they are made to bear the cost of the local improvement, they, at the same time, *suffer no pecuniary loss thereby.*"

Rector v. Board of Improvement, 50 Ark. 116-129.

"The benefits need not be exclusive; the general public may also derive benefits in a more remote degree, yet if there is a *special* and *peculiar* benefit inuring to adjoining property, local assessments are justified."

Shibley v. Fort Smith & Van Buren Dist., 96 Ark. 410-416.

"We have never held, nor are we aware that any other court has ever held, that assessments of local improvements may be assessed according to value as such, but such assessments are always sustained distinctly upon the assumption that the benefits will accrue in proportion to such value."

Alexander v. Board of Directors Levy Dist., 97 Ark. 322-331.

"The benefits must be special and peculiar, and if there are no special and peculiar benefits, the assessment cannot be made."

Board of Improvement v. Pollard, 98 Ark. 543-549.

It was held in Myles Salt Co. v. Iberia Drainage District, 239 U. S. 478, that power, arbitrarily exerted, imposing a burden without a compensating advantage of any kind, amounts to confiscation and violates the due process clause of the Fourteenth Amendment.

In Gast Realty Company v. Schneider Granite Company, 240 U. S. 55, the Court said:

> "The Legislature may create taxing districts to meet the expense of local improvements, and may fix the basis of taxation without encountering the 14th Amendment unless its action is palpably arbitrary or a plain abuse."

"THE BENEFITS FIXED BY LEGISLATIVE DETERMINATION"

Under this caption in the brief on behalf of the appellant counsel for appellant says:

> "However the legislature of the State of Arkansas at its 1921 session, passed Act No. 626 * * * approved March 29, 1921."

This statement is followed by quoting the Act of the General Assembly of the State of Arkansas approved March 29, 1921, and also the Act approved February 12, 1923, which again attempted to con-

firm and validate the original assessment of benefits, and the increase thereof, as made by the Board of Assessors acting under the authority of the later Act. There was no answer filed to the amendment challenging the constitutionality and the validity of this later Act of the Legislature (R. 33), and among other allegations in said amendment appears the following:

> "Because said Act is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that 'No state shall deny to any person within its jurisdiction the equal protection of the law,' and which also provides that 'No state shall deprive any person of life, liberty or property without due process of law.' That this complainant's property would not be benefited by the construction or improvement of said road; that said road, if improved, would be a detriment instead of a benefit to this complainant's property in said Road Improvement District, in that it would deprive this complainant of both freight and passenger traffic, and therefore said assessment of benefits against its property would be and is confiscatory and would deprive it of its property without due process of law. (R. 36) * * *
>
> That the Legislature in passing said Act

transcended its authortiy by attempting to find that the assessment of benefits that were made in said district 'is hereby found to be fair, equitable and just as made and is hereby in all things confirmed and declared to be the benefits accruing to the property therein assessed,' when the original Act provided an appeal to the courts for the purpose of determining the fairness and justness of said assessment of benefits. That said defendants and said Commissioners knew at the time that they caused said Act to be introduced and passed by the Legislature that a suit was pending in this Court in which the issue was involved as to the fairness and justness of said assessment, and was an attempt to deprive this complainant of its property without due process of law in violation of Section One of the Fourteenth Amendment to the Constitution of the United States. (R. 37.)

* * *

That said Act of the Legislature attempting to confirm said assessment of benefits and attempting to grant to the assessors the powers to increase said assessment and to re-assess said property, and the Act approved February 12, 1923, attempting to validate and confirm said re-assessment of property, and the original assessment as made by the Board of Assessors is demonstrably erroneous, confiscatory, discriminatory, unfair, unjust, inequitable, excess-

ive, exorbitant, palpably arbitrary, a flagrant abuse of the powers of the assessors under both of said Acts for the reasons stated in the amended and substituted bill filed herein, and that complainant herein is aggrieved by the action of said Board of Assessors in making said assessment, and by the Acts of the Legislature in attempting to confirm and validate said assessments as made by said Board of Assessors in assessing said property is in violation of Section One of the Fourteenth Amendment to the Constitution of the United States hereinbefore referred to." (R. 38).

The further suggestion under this head appears in brief for appellant:

"The District Court in this case did not undertake to find that the legislative determination of benefits against the property of the plaintiff under the provisions of these acts was wholly unwarranted, a flagrant abuse of authority or confiscatory; but merely found that the methods of assessment employed by the assessing board of the district was arbitrary and discriminatory because made upon a different basis from that used in assessing other real estate in the district."

The District Court made the following finding:

"The assessment against the real estate of

the defendant is on a mileage basis. The valuation for general taxation is taken. The assessment against other real estate is upon an area basis at a certain amount per acre dependent upon distance from the highway contemplated. This method of assessment is palpably arbitrary and discriminatory and results in a denial to the defendant of equal protection of the laws." (R. 39).

The District Court further found:

"There will be no direct benefit to the property of the Railroad Company by the construction of the highway. On the contrary, there will be a loss to it in freight and passenger traffic by reason of the construction of the highway." (R. 39).

The case of Branson v. Bush, supra, is again cited, but in that case the Court stated:

"The subject was carefully re-examined and the law restated in cases so recent as Phillip Wagner v. Leser, 239 U. S. 207, 60 L. ed. 230, 36 Sup. Ct. Rep. 66, and Houck v. Little River Drainage Dist. 239 U. S. 254, with the result that the rule as we have stated it was approved, with the qualification, which was before implied, that the legislative determination can be assailed under the 14th Amendment only where the

legislative action is 'arbitrary, wholly unwarranted, a flagrant abuse, and by reason of its arbitrary character a confiscation of particular property.'"

And the case of Milheim v. Moffat Tunnel Improvement District, 262 U. S. 710, is cited, and there again appears the qualification to the rule that the determination of the Legislature with reference to benefits that will accrue to the property by reason of the improvement contemplated by an Improvement District "can not be assailed under the Fourteenth Amendment unless it is wholly unwarranted, a flagrant abuse, and by reason of its arbitrary character is mere confiscation of the particular property."

The evidence is conclusive that the highway in this case will be a detriment instead of a benefit to the railroad company, and therefore, to tax the property would be mere confiscation, and come within the terms of every decision of the Courts in which an assessment of benefits under such circumstances is condemned.

The Supreme Court of Arkansas, in the case of Bush v. Delta Road Improvement District, 141 Ark. 253, says:

"In the case of Coffman v. St. Francis Drain-

age District, 83 Ark. 54, the Legislature created the district, fixed the boundaries thereof, and made the assessment. It was there claimed that the act of the Legislature was such an arbitrary abuse of the taxing power as would amount to a confiscation of the plaintiff's property without any benefit whatsoever to him. The court held that, while the Legislature, in creating a drainage district, may provide what lands shall be assessed for the improvement, and the extent of such assessment, the court will interfere where the act of the Legislature is such an arbitrary abuse of the taxing power as would amount to a confiscation of property without benefits. In that case as we have already seen, the assessment of benefits was made by the Legislature, *and it was held that the courts could review the action of the Legislature upon proper allegations and proof showing that the proposed district amounted to a confiscation of the plaintiff's land.*"

The Court in the case of Wagner v. Leser, 239 U. S. 219, in its opinion said:

"We do not understand this to mean that there may not be cases of such flagrant abuse of legislative power as would warrant the intervention of a court of equity to protect the constitutional rights of land-owners, because of arbitrary and wholly unwarranted legislative

action. The constitutional protection against deprivation of property without due process of law would certainly be available to persons arbitrarily deprived of their private rights by such state action, whether under the guise of legislative authority or otherwise."

It appears from the evidence in this case that the assessment of railroad property is made by the State Tax Commission, and not by the County Assessor (R. 113), and that railroad property is assessed by the mile. (R. 156).

PARALLEL HIGHWAY

It is suggested under the above caption:

"If it be said that the highway constructed by the defendant district parallels the line of the plaintiff's railway, then we answer that the only effect of this, as shown under the undisputed testimony in this case, is to develop, improve and increase the prosperity of the community adjacent to the highway and railroad, and thereby necessarily result not in 'an indirect, remote, doubtful and speculative benefit' to the property of the railroad company, but, as shown from the admission of the employees of the plaintiff's traffic department, as well as the testimony of the other witnesses in the case,

will result in a direct, substantial and ever-increasing benefit, with the possible loss in small business and short hauls far more than offset by the continuing growth of the plaintiff's general and more profitable business."

Statements of this character are so directly in conflict with the evidence that we deemed it necessary to make a statement and abstract of some of the evidence with references to the pages of the record. There are a great many other statements of like character, but the evidence upon which the Court based its decree in this cause sufficiently answers such statements, and relieves us of the necessity of calling this Court's attention to each of the unwarranted statements of this character found in the brief on behalf of the appellant.

The suggestion in these statements is that the railroad should be taxed on account of a community benefit which would result from the building of the road, and not those "special and peculiar benefits" which the law of Arkansas only recognizes as a basis to justify an assessment of benefits against any property.

"IN NO EVENT SHOULD PROPERTY OF THE RAILROAD COMPANY ~~ONLY~~ wholly ESCAPE TAXATION FOR THIS PUBLIC IMPROVEMENT."

Under this caption in appellant's brief, the case of Kansas City Southern Ry. Co., et al, v. Road Improvement District No. 3 of Sevier County, 266 U. S. 380, is cited as an authority in support of this statement. In that case this Court in its opinion says:

> "The road in question extends, at right angles to the railway line, a distance of 18 miles into a country well adapted to supplying large traffic for the railway when the improvement is completed. Adjacent to the road, as is conceded in the brief for the railway companies, are 1,587 tracts of farm lands of less than 80 acres and 246 tracts of a larger acreage. The only practicable route to available markets is through DeQueen and over the railway. These facts, together with the affirmative evidence of what was undertaken and done in the way of growing new crops and shipping them out over the railway as soon as the improvement was well under way, illustrate that there was a real basis for assessing the railway property at DeQueen with substantial benefits."

The facts in that case demonstrated that the

highway was a "feeder" to the railway and not a destroying competitor as in the case at bar.

The appellant in its brief quotes a garbled portion of the cross-examination of C. E. Carstarphen, Division Agent of the Missouri Pacific Raliroad Company. By referring to the record (pp. 85, 86) he testified:

"Q. Have you observed in your experience, do you know of any specific instances where the building of such a road paralleling the railroad has had the effect of taking away its traffic?

"A. Well, I might recall the first hard surface road built in this country.

"Q. What effect did that have?

"A. Absolutely took it all. Somebody did. We haven't had any since it was completed.

"Q. Do you know what the amount of traffic was before the building of the road?

"A. No, I couldn't state as to that. I know prior to the building of the hard surface road that we had a car every day between Fort Smith and Van Buren. The freight hauled in that car was made up here from the different jobbers in all the different lines, and it was loaded that day and got out that

night and delivered in Van Buren either that night or next morning. After the hard surface road was built the business gradually decreased until at this time I don't presume there would be over 5 per cent of the traffic moving between Fort Smith and Van Buren aside from business that is delivered to us by connecting lines, that is, that is hauled from one railroad to the Missouri Pacific depot and goes to Van Buren that way.

"Q. But from the local wholesale houses in Fort Smith?

"A. Nothing, absolutely nothing.

"Q. How is the freight transported?

"A. By motor truck. Prior to the motor truck it was hauled by wagon."

And on re-direct examination, he testified:

"Q. I understood you to answer Judge Evans that some of that freight is carried at a loss by the railroad? Did you make that statement?

"A. Well, in this way: Some times these cars are loaded very heavy. Sometimes they have ten or twelve thousand pounds in them. In a case of that kind it is very profitable,

but where it gets down to five hundred or a thousand pounds then it would not be profitable.

"Q. If you have to haul the car and you run the train anyway, does it cost you any more?

"A. No.

"Q. Aren't you required to run daily local freights?

"A. Yes.

"Q. Does it cost any more to operate one of them when they are hauling heavy traffic, than when they are hauling empty cars?

"A. I shouldn't think it would since they have got to make the trip anyway." (R. 90).

When the entire evidence is considered in this case and under the Act of the Legislature creating this Road Improvement District, limiting the assessment to the benefits that would accrue, there is no escape from the conclusion that the Court was correct in holding that the building of this road would be a detriment instead of a benefit to the property of appellee.

CONCLUSION

In conclusion we respectfully submit that the findings of fact and declarations of law made by the trial Court in this case are fully sustained by the evidence and the law:

(a) "The assessment against the property of defendant includes personal as well as real property. The inclusion of personal property is unlawful."

It is an admitted fact that personal property to the extent of $52,465.00 was included. (R. 156).

"It must readily be conceded, and it is conceded by appellee, that taxation for local improvement must be confined to real estate to be benefited by the proposed improvement. Personal property is not subject to taxation for that purpose, nor was it attempted in the enactment of the statute under consideration to tax personalty."

Fort Smith Light & Traction Co. v. McDonough, 119 Ark. 254.

"The question is, therefore, squarely presented whether or not personal property can be subjected to taxation for local improvements. This has not heretofore been attempted in this

State, as we have already said, nor can we find in the books any example of an attempt in other states to tax personal property as such for the purpose of defraying the expenses of local improvements."

Snetzer v. Gregg, 129 Ark. 546.

(b) "The assessment against the real estate of the defendant is on a mileage basis. The valuation for general taxation is taken. The assessment against other real estate is upon an area basis at a certain amount per acre, dependent upon distance from the highway contemplated. This method of assessment is palpably arbitrary and discriminatory and results in a denial to the defendant of equal protection of the laws."

The evidence is conclusive as to the method adopted by the assessors, and the authorities cited sustain the Court in its finding that such a method is "palpably arbitrary and discriminatory, and results in a denial to the defendant of the equal protection of the laws."

(c) "There will be no direct benefit to the property of the Railroad Company by the construction of the highway. On the contrary there will be a loss to it in freight and passenger traffic by reason of the construction of the highway."

(d) "An indirect benefit to the defendant railroad

company by the construction of the highway is remote, doubtful and speculative."

The finding of fact by the Court that the railroad would suffer "a loss to it in freight and passenger traffic by reason of the construction of the highway," is not only warranted by the evidence, but no other reasonable conclusion could be reached from the evidence.

The testimony of the ~~passenger~~ traffic agent of the appellee is not disputed, that an investigation conducted by him to ascertain the reason for the loss of business between Little Rock and Benton, Arkansas, a distance of only twenty miles, revealed the fact that the improved highway between the two places had enabled the motor truck to absorb that traffic which had formerly produced a net revenue of from $40.00 to $45.00 per day (R. 73); that the same train is still operated at the same expense, but without this revenue.

We submit that the evidence in the record shows conclusively that the decree is based upon the evidence and should be affirmed.

Respectfully submitted,

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